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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. THOMAS OCHOA, Defendant and Appellant.	A129751 (Alameda County Super. Ct. No. CH43058)

Defendant and appellant Thomas Ochoa and the victim in this case, Michele, both attended a Halloween party at a friend's house. Michele became extremely intoxicated, went to sleep in the host's bedroom, and awoke to discover defendant raping her. Defendant was convicted of both rape of an intoxicated person and rape of an unconscious person, as well as attempted sexual penetration with a foreign object of both an intoxicated person and an unconscious person. Defendant claims the trial court committed reversible error in excluding evidence of a prior unreported rape of Michele. He also maintains it was error to convict him of two counts of rape based on the same act, and makes the same claim as to the two convictions of sexual penetration. He additionally claims the drug conditions of his probation should have included a scienter element. We conclude the trial court did not err in excluding the challenged evidence, but do agree with defendant's remaining contentions and order the judgment modified accordingly.

PROCEDURAL AND FACTUAL BACKGROUND

The charges against defendant arose out of an incident at a Halloween party at the home of Jason Richards (Richards) on October 21, 2006. Richards was a coworker of Michele's, and a former coworker of defendant's.

Michele arrived at the party when it was still daylight. Guests were carving pumpkins, barbecuing, and listening to live music. Michele did not eat much, but had "[s]everal beers and mixed drinks." She also smoked some marijuana, but was mainly feeling the effects of the alcohol. Michele did not know defendant prior to the party. They had a brief conversation, during which they did not discuss dating or sex, nor did they exchange phone numbers or e-mail addresses.

At some point that evening, Michele remembered "stumbling and falling." She was so drunk she "couldn't hold [herself] up so someone helped [her] to a couch inside." The couch was in a "computer room." Richards came in to check on her and asked if she was "going to be okay here?" Michele said " 'Aah, fine,' " and "she was sleeping."

Michele tried to rest, but people kept coming in and out of the room, so she moved to a couch in Richards' bedroom. The room was dark except for a jack-o-lantern and a black light. Another intoxicated woman, Tara Donovan, was sleeping on the bed. Michele was wearing brown stretch-top pants, a bathing suit top and an "Army print camouflage shirt." She had been wearing a "tube top/corset style thing over the shirt [she] was wearing," but she removed it before lying down on the couch with a blanket. She was "just drunk and trying to sleep, [and was] passed out." Richards came in and checked on her again.

Michele was awakened sometime later "by the insertion of a penis inside of [her vagina]." She was lying on the couch in a fetal position on her right side, facing the back of the sofa. She testified "what woke me up was the pressure of it, because of the way I was laying, and just like the forcefulness of him trying to get all the way inside of me, . . . and that's what woke me up. . . ." Michele was "really confused" and "couldn't believe it was happening." She had not looked at the man or spoken to him. She remembered her "hands being held down and that just upsetting me." Michele was turned over onto her

back "right when [she] was coming around." The man was "trying to insert his penis into [her] vagina again."

Michele started screaming and resisting, trying to get free. She and the man struggled for less than a minute before she pushed him off her. The man "got up and said something to the effect of . . . 'I thought you wanted it,' and then left."

Michele testified she remembered "just panic." She wrapped the blanket around herself and started looking for her clothes, then jumped on the bed next to Tara Donovan. Michele tried to wake her up, but she "seemed to be completely passed out."

Around that time, Marc Payne, a friend of Donovan's, was looking for her so he could drive her home. He went to Richards' bedroom because he knew Donovan had been there earlier. He attempted to open the bedroom door, but it was locked. Payne went to Richards and asked why the door was locked. Richards told him it should not be, and advised him to try again. Payne returned to the bedroom door, but it was still locked so he "proceeded to bang on the door." There was no response. As Payne started to walk away, the door suddenly opened and defendant quickly walked past with his head down.

While looking for her clothes, Michele found a cell phone on the couch. She went outside to the carport and asked if anyone knew whose phone it was. Someone told her it was "Thomas'[defendant's] phone." Michele "told them what happened and threw the phone on the ground and was just really upset." The "group of guys who were intoxicated and confused" did not seem to understand her.

Michele went back inside the house and told a "blonde lady" what had happened, because she felt a woman might understand. The woman, Faith Anne Cook, testified Michele was shaking, crying and "seemed broken." Michele told her "she woke up with some guy on top of her and she doesn't know what happened or how it happened." Michele said "he was inside of her when she woke up." Michele told Cook the man said something to the effect of "she gave him permission."[1] Cook advised her to seek medical

[1] In defendant's opening brief, he mistakenly states Cook testified Michele told her she gave defendant permission to have sex with her.

care and call the police. Michele was "scared to call . . . she didn't understand that they would actually do something about it."

Michele drove to the hospital where a sexual assault examination was performed. The examination revealed no "physical findings." Hospital staff gave her antibiotics, the morning-after pill, and ibuprofen. Michele gave a statement to police later that morning.

Police then contacted defendant and asked him to come to the police station to "give his side of the story." He voluntarily went to the police station to "clear his name." He told police he arrived at the party with his brother around 6:00 p.m. He had never met or talked to Michele before the party. Both were drinking, and during the party they had two "[v]ery short" conversations about working in grocery stores. The only physical contact the two had prior to the incident was a handshake.

Around 2:00 a.m., he was looking for his brother and went into a bedroom. Inside, he saw two bodies, one on a couch and one on the bed. Defendant lifted the covers from the person on the bed, saw it was a woman, and put the cover down and apologized. He walked over to the person on the couch, picked up the covers and saw a "fully clothed" "girl who [he] . . . was attracted to earlier that day."

Defendant got up and went to the bedroom door, but because he had been attracted to her earlier, he "decided to turn around and to see . . . if possibly there was a chance that . . . [he could] hook up with her." He did not lock the bedroom door. Michele was lying in a "fetal position," facing the back of the couch. Defendant sat on the couch next to her and whispered "hey" to see if "she'd acknowledge."

Defendant started to massage her inner thigh and "began to get sensual movement back . . . which led [him] to believe that . . . she was . . . willing." He continued to massage her body, moving to her crotch and breasts, and "sensual movement continued." He put his hand in her pants and "started fondling." Defendant agreed he put his "fingers in her vagina." He pulled down her pants " a little bit, so [he] could have . . . easier access." Her "backside start[ed] . . . to move a little bit, and . . . some sensual moans [were] coming . . . out of her." Defendant continued to pull down her pants, and he felt she was giving him "some assistance to get them off. Not . . . with her hands or anything,

but by . . . moving to kind of wriggle out of her pants." He removed his pants, lay behind her, and stated "I penetrated, you know, put my penis in." Michele did not look at him or say anything, and there was "[n]ever exchange of conversation." "She was asleep as far as [he was] concerned," though she "[v]ery well could have been" passed out, but he did not know.

He continued to "have sex" with her for a few minutes, "maybe two or three," but "the position just really wasn't working out, so [he] got up and [he] grabbed . . . her upper thighs . . . to go move her over." As she moved over, "she got really startled or frazzled and just, like, you know, [said] 'what are you doing . . . stop.' " Defendant said he was sorry and backed up. He did not ejaculate. The encounter, from the time he sat down on the couch until the time she told him to stop, was "maybe 15 minutes, 20 minutes."

Michele jumped into the bed where the other woman was sleeping. Defendant was "kind of in shock." Until that point, she had not told him to stop—she had not said anything at all. Michele told him " 'don't even fucking talk to me, get the fuck out of here.' " Defendant put on his clothes and left with his brother. His brother returned to the house in the early morning hours to retrieve his cell phone.

At trial, defendant testified he was mistaken in some of his statements to police, and had omitted some information. He spoke to Michele on two occasions at the party, not one. She told him she was "single and just wanted to have fun," which he took to mean she was available. Their handshake was "flirtatious . . . where if [he] would have kissed the top of her hand it probably wouldn't have been unexpected to her." Defendant believed Michele "appeared to be flattered at the way [he] was flirtatiously talking with her and responded and probed to ask more questions . . . ." He had a second conversation with her around 9:00 p.m. Between the second conversation and 2:00 a.m. the next morning, they did not speak but "exchanged . . . flirtatious sort of eyes." Defendant had a total of seven alcoholic drinks at the party.

When defendant started touching Michele in the bedroom, she began to "move sensually" and "[t]here was no question in [his] mind that she was awake." He testified he had made "poor assumptions" when he told police Michele was asleep. Michele never

indicated to him she was not consenting, and defendant testified he "was aiming to please this young lady that was allowing me to please her." Defendant explained this was "absolutely consistent with [his] previous experiences" with his fiancée, when he would "have just some affectionate touching" with her when she was asleep and she would wake up and have sex with him. He believed that "all signs were a go for me." It would be against his Catholic upbringing to force himself on a woman.

At the time he gave his statement to police, defendant "did feel there was a possibility that [his penis] did touch her vagina. However, critically thinking about the situation and reenacting it, [he] found that there[was] not a possibility that [his] penis would have touched her vagina whatsoever." After measuring his penis and reenacting the encounter with his fiancée, defendant realized it was physically impossible for him to touch Michele's vagina with his penis. He based this conclusion on the length of his "not completely erect" penis and Michele's position on the couch placing her vagina "at an angle," and explained penetration in that position would only have been possible by "somebody . . . well-endowed." When he used the word "penetration" in his statement to police, he was actually "unclear if [he] had penetrated her or not." He testified "I know now that my penis did not come into contact with her vagina."

Though defendant acknowledged "having sex" with Michele in his police statement, he explained at trial "[m]y definition of sex is any time the penis comes into contact with a vagina . . . whether it be vaginally [or] somewhere around . . . ." He testified his "agreeable response" to police was "clearly not an indication that [he] was listening to that question."

The jury found defendant guilty of rape of an intoxicated person, rape of an unconscious person,[2] and the lesser offenses of attempted sexual penetration by a foreign object of an intoxicated person, and attempted sexual penetration by a foreign object of an unconscious person.[3] The court suspended imposition of sentence and placed

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[2] Penal Code section 261, subdivision (a)(3)-(4). All further statutory references are to the Penal Code unless otherwise indicated.

[3] Sections 289, subdivisions (d), (e), 664.

defendant on probation for five years, the first year to be served in county jail. The probation terms and conditions also included that defendant not use, possess, or traffic in narcotics, and that he "not associate with any persons using or in any way trafficking narcotics or dangerous drugs." This timely appeal followed.

DISCUSSION

Exclusion of Evidence of Michele's Prior Unreported Rape

Defendant maintains the court abused its discretion by excluding evidence Michele was raped in the past but did not report it. He asserts the evidence should have been admitted to impeach Michele's testimony that "reporting rape is the right thing to do." Defendant also claims exclusion of this evidence rendered his trial fundamentally unfair and denied him his constitutional rights to present a defense and confront witnesses against him.

The defense made numerous attempts to introduce evidence of Michele's prior unreported rape. Via an in limine motion, the prosecution sought to exclude evidence of Michele's statements she had been raped by a family friend but had never reported it to police, and did not want to reveal the individual's name. Michele had made the statements in an interview with a Department of Justice investigator and a deputy attorney general.[4] Additionally, one of Michele's coworkers reported Michele told her she had been raped and missed work because of it.

Defendant's counsel initially argued evidence about the prior rape "would be relevant to show . . . what she's done before is describe a non-rape as a rape." He explained "if this lady has a penchant for believing she's been raped when she hasn't been, and this incident that she calls a rape unreported is one of those instances, it certainly would be unjust for the finder of fact not to know about that." The court excluded the evidence, explaining "She's never reported another rape, according to what the prosecutor has told me. She has discussed [the prior rape] in talking to [the deputy attorney general] and maybe his investigator . . . [¶] . . . [¶] . . . So the Court is ruling at

[4] The Attorney General prosecuted the case because Michele's mother worked for the Alameda County District Attorney's office.

this time that you are not permitted to ask questions . . . related to a prior incident within the last year to two years."

Following this initial ruling, Michele testified a number of times she went to the hospital and reported the rape because she wanted "to do the right thing." Defendant's counsel again sought to introduce evidence of Michele's statement to investigators she had been raped by a family friend but never reported it. He argued it had a direct bearing on the credibility of her testimony that she reported the rape because she wanted to do "the right thing." He asserted it showed Michele "lied to the jury because she told them that she [reported the rape] . . . because it was the right thing to do. That's not why she reported this rape." The prosecution argued the evidence should be excluded under Evidence Code section 352 because it was "absolutely collateral and will get us into a big waste of time, and under 352, it will distract and confuse the jury." The court again excluded the evidence of the unreported prior rape.

Michele testified she went to the hospital and reported the rape for a number of reasons: "I was just raped. I wanted medical attention. . . . I didn't want to catch anything. I didn't want to become pregnant. I was scared. I wanted to do the right thing and go to the hospital, to the emergency room where I knew that I would be taken care of, because I was scared." Defense counsel asked Michele what she meant by "do the right thing." She answered "I know there are a lot of women that are raped and that don't come forward, and because of this I feel that more people are raped and that's why I'm here. Because I don't want this happening to someone else." Defense counsel then asked "where do you get this information?" to which Michele responded "It's common knowledge." Defense counsel pressed her to explain where she learned this common knowledge, and Michele explained "I've read several books on feminism. There's a book called 'Backlash' if you want me to give you a specific example [¶] . . . [¶] . . . this is just common knowledge that a lot of women don't come forward after being raped." She also testified her sister had studied the issue in college and talked to her about it.

Evidence Code section 352 provides "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its

admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." While evidence of prior *false* reports of rape may be admissible, (*People v. Tidwell* (2008) 163 Cal.App.4th 1447) a victim cannot be forced to testify about a sexual assault. (Code Civ. Proc., § 1219, subd. (b) ["no court may imprison or otherwise confine or place in custody the victim of a sexual assault . . . for contempt when the contempt consists of refusing to testify concerning that sexual assault"].)

Here, the fact Michele had been raped by a family friend while a teenager and never reported it had limited relevance as impeachment of her testimony she reported the rape for a number of reasons, not only because it was the "right thing" to do. There was no indication Michele had ever made a false accusation of rape. Introducing evidence of the prior unreported rape would have consumed an undue amount of time on a tangential issue, and likely would have confused the jury. There was no abuse of discretion in excluding evidence of the prior unreported rape under Evidence Code section 352.

"As a general proposition, the ordinary rules of evidence do not infringe on a defendant's right to present a defense." (*People v. Frye* (1998) 18 Cal.4th 894, 945, overrule don another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) " '[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." ' [Citations.] However, not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations.] . . . Thus, *unless the defendant can show that the prohibited cross-examination would have produced* '*a significantly different impression of* [*the witnesses'*] *credibility*' [citation], *the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment*." (*Id.* at p. 946.)

The evidence Michele was raped in the past and did not report it would not have produced a "significantly different impression" of her credibility. The prior unreported rape took place approximately 18 months before the incident here, when Michele was still a teenager, and involved a family friend. The fact she was raped in the past under those circumstances was also entirely consistent with her testimony that many women do not report rape, and she believed it was the right thing to do. Defendant was also able to fully present his defenses of consent by "sensual movement" and the claimed physical impossibility of penetration. Accordingly, there was no deprivation of defendant's due process or confrontation rights.

Even assuming arguendo exclusion of the evidence was constitutional error, it was harmless beyond a reasonable doubt.[5] Defendant concedes the "parties were fairly consistent in their testimony, except as to the critical question of consent." Indeed, his description of the incident to police a few hours afterwards was almost identical to Michele's description. The only significant difference was defendant's perception of consent based on his claim the victim, whom he believed to be asleep, made "sensual movements." At trial, defendant's testimony contradicted the earlier statements he made to police. Defendant testified he was mistaken when he admitted to police he had sex with and penetrated Michele, and that he was simply being agreeable. He further testified to his own understanding of the definition of "sex" and "penetration," which did not necessarily mean intercourse or penetration. Defendant also raised a physical impossibility defense based on his anatomy and Michele's position on the couch. Given the defendant's frankly implausible testimony, even if exclusion of the evidence were error, it was harmless beyond a reasonable doubt.

[5] Because the error was harmless under the *Chapman* standard, it was necessarily harmless under the "less stringent" standard of *People v. Watson* (1956) 46 Cal.2d 818, 837. (*Chapman v. California* (1967) 386 U.S. 18; see *People v. Cahill* (1993) 5 Cal.4th 478, 510.)

Double Convictions for the Same Acts

The parties agree defendant can be subject to only a single conviction of rape and a single conviction of attempted penetration with a foreign object. They disagree on how this result should be accomplished. Defendant maintains one count of rape and one count of penetration with a foreign object should be dismissed, while the Attorney General avers the judgment should be amended "to reflect a single conviction for counts one and two, and a single conviction for counts three and four," in order "to accurately reflect all of the subdivisions which [defendant] violated in committing the rape."

Section 654 provides in part "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of punishment, but in no case shall the act or omission be punished under more than one provision. [A] conviction and sentence under any one bars a prosecution for the same act or omission under any other." (§ 654, subd. (a).) "Section 954 provides, in relevant part: 'An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense . . . under separate counts . . . . The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged. . . .' (Italics added.) Thus multiple charges and multiple convictions can be based on a single criminal act, *if the charges allege separate offenses*." (*People v. Muhammad* (2007) 157 Cal.App.4th 484, 490, italics added.) Neither party contends the two counts of rape or the two counts of digital penetration constituted separate offenses, and thus agree there cannot be two convictions of rape or two convictions of digital penetration.

The Attorney General claims *People v. Craig* (1941) 17 Cal.2d 453 (*Craig*), "mandate[s]" the remedy of consolidating two convictions for the same act based on different theories "into a single conviction listing both subdivisions for which [defendant]

was convicted." *Craig* did not "mandate" that remedy—it ordered it without discussion of whether one conviction should be vacated. (*Ibid.*)[6]

More recent cases, including one on which the Attorney General relies, have made clear where there are multiple convictions for the same offense based on different theories, all but one of the convictions must be vacated. The Attorney General asserts *People v. Coyle* (2009) 178 Cal.App.4th 209 (*Coyle*) and *People v. Scott* (1944) 24 Cal.2d 774 (*Scott*) both "consolidated" multiple convictions into one conviction reflecting all of the subdivisions which the appellants were found to have violated.

Coyle did *not* "consolidate" the multiple convictions. In that case, the defendant was convicted of murder of a single victim under three "alternative theories of the offense." (*Coyle, supra,*178 Cal.App.4th at p. 217.) Rather, the court held "[w]e shall *vacate* defendant's convictions of murder in counts II and III, together with the sentences imposed but stayed on those counts, and modify the judgment on count I to reflect defendant was convicted of murder with true findings on [both] the special circumstances . . . ." (*Id.* at p. 218, italics added.)[7]

In *Scott*, the court held "[t]he defendant, however, cannot be convicted on three separate counts of rape, all based on a single act of intercourse. Under section 261 of the Penal Code a single act of intercourse amounts to only one punishable offense of rape even though it be accomplished under more than one of the circumstances enumerated in

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[6] In *People v. Scott* (1966) 247 Cal.App.2d 371, the court interpreted *Craig* as reversing "not merely the sentence, but the conviction for one of the offenses. . . . [E]limination of an improper conviction was necessary 'to preclude the dual judgments of the trial court from hereafter working any possible disadvantage or detriment to the defendant in the later fixing of his definite term. . . .' " (*People v. Scott*, at pp. 377-378, quoting *People v. Craig*, *supra*, 17 Cal.2d at pp. 458-459.)

[7] Similarly in *People v. Muhammad, supra*, 157 Cal.App.4th 484, the defendant was charged and convicted of four counts of stalking based on a single offense but four different subdivisions of the statute. The court held the different subdivisions did not define separate substantive offenses. (*Id.* at pp. 493-494.) Thus, "[t]hough the single stalking offense was charged in four separate counts, defendant could be convicted of only one count of stalking. Consequently, three of defendant's four stalking convictions must be *vacated*." (*Id.* at p. 494, italics added.)

that section. (*People v. Craig*, [*supra*,] 17 Cal.2d 453 . . . .) The separate judgments on Counts I, II and III, must therefore be consolidated into a single judgment." (*Scott, supra*, 24 Cal.2d at p. 777.) Though it used the word "consolidated," *Scott* was silent about whether the consolidated judgment must indicate it was based on three different convictions or different subdivisions of section 261.

More recently, in *People v. Smith* (2010) 191 Cal.App.4th 199 (*Smith*), the court considered circumstances on nearly all fours, i.e. multiple convictions for the same act of rape. In *Smith*, the evidence "indicated only one act of sexual intercourse with the victim, but defendant was charged with, and the jury found him guilty of, two counts of rape—rape of an intoxicated woman and rape of an unconscious woman." (*Id*. at p. 205, italics omitted.) The court held "[b]oth convictions cannot stand because 'only one punishable offense of rape results from a single act of intercourse, though it may be chargeable in separate counts when accomplished under the varying circumstances specified in the subdivisions of section 261 of the Penal Code.' " (*Ibid*., quoting *People v. Craig*, *supra*, 17 Cal.2d at p. 458.) The *Smith* court thus "modif[ied] the judgment to strike the second rape count." (*Smith*, at p. 205.)

We take the same approach here and will vacate one of the rape and one of the digital penetration convictions. The Attorney General seeks dismissal of counts 2 and 4 if the convictions are not "consolidated." Defendant also seeks dismissal of count 2, but does not specify which digital penetration conviction he seeks to have dismissed.

Section 654 provides in part "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment . . . ." (§ 654, subd. (a).) Though the length of the sentence does not differ based on the whether the conviction is for rape of an intoxicated person or rape of an unconscious person, there is one difference in the potential severity of the consequence based on whether the defendant is convicted of section 261, subdivision (a)(3) or subdivision (a)(4). If an individual is convicted of section 261, subdivision (a)(3), and in the future suffers a conviction of certain sex crimes enumerated in section 667.6, subdivision (e), that person "shall receive a five-year

enhancement . . . ." (§ 667.6, subds. (a), (e).) Accordingly, we will strike the conviction of rape of an unconscious person under section 261, subdivision (a)(4), (count 2) and the conviction of digital penetration of an unconscious person under section 289, subdivision (d) (count 4).

Scienter Requirement in Probation Conditions

Defendant maintains his probation "drug conditions" must be modified to include a knowledge requirement. The Attorney General concedes a scienter requirement is required, but urges us to adopt the approach of the Third District and "construe every probation condition proscribing a probationer's presence, possession, association, or similar action to require the action be undertaken knowingly. It will no longer be necessary to seek a modification of a probation order that fails to expressly include such a scienter requirement." (*People v. Patel* (2011) 196 Cal.App.4th 956, 960-961.)

"A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated . . . .' " (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) Courts applying this principle have long held that a probation condition that forbids certain conduct, but that lacks a knowledge requirement, is invalid because it is impermissibly vague and overbroad. (See, e.g., *In re Justin S.* (2001) 93 Cal.App.4th 811, 816.) In the context of a probation condition that "defendant not associate with anyone 'disapproved of by probation,' " the Supreme Court held "modification to impose an explicit knowledge requirement is *necessary to render the condition constitutiona*l." (*In re Sheena K.*, *supra*, 40 Cal.4th at pp. 890, 892, italics added.) Thus, we will modify the probation condition to include a knowledge requirement. (See *People v. Moses* (2011) 199 Cal.App.4th 374, 379-381.)

DISPOSITION

We direct the trial court to modify the judgment to vacate the convictions of counts two and four, rape of an unconscious person and digital penetration of an unconscious person. The "drug condition" of probation shall be modified to read as follows: "Do not knowingly use, possess or in any way traffic in narcotics or dangerous

drugs, and do not associate with any persons known by you to be using or in any way trafficking in narcotics or dangerous drugs." In all other respects, the judgment is affirmed.

_____
Banke, J.

We concur:

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Margulies, Acting P. J.

_____
Dondero, J.